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October 27, 2005

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, DC 20554

Re: *MB Docket No. 03-15*
WSJV Television, Inc. (FRN 0002893881)
Station WSJV-DT, Elkhart, Indiana (Facility ID No. 74007)
Request for Waiver of 100% Replication Standard

Dear Ms. Dortch:

This letter is submitted on behalf of WSJV Television, Inc. ("WSJV-TV"), licensee of WSJV channel 28 and permittee of WSJV-DT channel 58, in order to request a waiver of the "use-it-or-lose-it" replication procedures ("Replication Requirements") established in the Commission's September 7, 2004 *Report and Order* in MB Docket No. 03-15¹ and elaborated on in the Commission's June 15, 2005 Public Notice.² This request for waiver is filed because WSJV-DT is providing 96.3 percent replication instead of 100 percent.³

¹ *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, FCC 04-192, 19 FCC Rcd 18279 (2004) ("Report and Order").

² Public Notice: *DTV Channel Election Issues – Compliance with the July 1, 2005 Replication/Maximization Interference Protection Deadline; Stations Seeking Extension of the Deadline*, DA 05-1636, June 15, 2005 ("Public Notice").

³ *Report and Order* at ¶3: "July 1, 2005 – Use-it-or-lose-it deadline for DTV licensees affiliated with the top-four networks (i.e., ABC, CBS, Fox and NBC) in markets 1-100. Those licensees that receive a tentative DTV channel designation in the channel election process on their current digital channel must construct full, authorized facilities. Those licensees that receive a tentative DTV channel designation on a channel that is not their current DTV channel must serve at least 100 percent of the number of viewers served by the 1997 facility on which their replication coverage was based."

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Background

In 1997, the FCC assigned channel 58 to WSJV-TV as the digital companion to WSJV's analog channel 28, with digital replication facilities of 334.3 kw ERP and 335 meters height above average terrain ("HAAT"). Although channel 58 is "out-of-core" and would not be available to WSJV-DT as a permanent digital channel, WSJV-TV strongly supported the transition to digital service and in 1999 filed an application to maximize digital facilities that was granted June 4, 2001. Pursuant to a grant of special temporary authority ("STA"), subsequently renewed several times, the Commission authorized WSJV-DT to operate at reduced power on channel 58 (initially at 10.5 kw and 315 meters HAAT and subsequently at 42 kw and 315 meters HAAT). The initial low power STA was granted August 28, 2002; the most recent STA for 42 kw and 315 meters HAAT was granted May 4, 2005; and WSJV-DT filed an application to renew the STA on June 30, 2005.

On June 20, 2005, WSJV-TV filed an application for modification of its granted DTV construction permit to reduce power (220 kw) and height (299 meters) from the maximization parameters. The modification application was granted on September 29, 2005. WSJV-DT initiated Program Test Authority on October 3, 2005, and filed its covering license application on October 14, 2005. The license application is currently pending.

Because WSJV-DT'S 96.3 Per Cent Replication Should Be Deemed In Substantial Compliance With The Commission's Criteria, Grant Of The Requested Waiver Would Serve The Public Interest

Under WSJV-DT's build out of its recently granted digital authorization, (220 kw ERP at 229 meters HAAT), WSJV-DT comes very close to 100 percent replication, missing by at most 3.7 percent.⁴ WSJV-TV submits that under any circumstances 96.3 percent replication is in substantial compliance with the standard. This is especially the case here, however, when a station serves the public interest by promoting digital television through the build out of DTV facilities that, because the transmitter is tuned to out-of-core channel 58, will have essentially no resale value post-transition. Indeed, the Commission expressly recognized the "greater potential for wasted expenditures in DTV facilities" that would be incurred by licensees assigned out-of-

⁴ If corrected data were used to calculate the baseline population covered by WSJV's analog Channel 28, the replication percentage of WSJV-DT's current operation would be even higher, 97.6 percent. Specifically, WSJV-DT's replication requirement is based upon the lower of the service populations associated with WSJV's analog and digital Channels in Table II of the Commission's December 21, 2004, Public Notice, DA 04-3922. The population total for WSJV's analog channel, however, was slightly exaggerated due to an antenna orientation error on WSJV's Channel 28 license in 1997. This error was remedied in 1999 by modifying WSJV's station license. The more accurate replication value of 97.6% is computed by running on a Sun Microsystems SunBlade 150 Workstation the "tv_process" software relied upon by the Commission and the same NTSC plan files "NPLN" that were used to establish the baseline totals in Table II.

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core interim DTV channels and even established special options for such licensees.⁵ Moreover, as described below, a waiver is warranted in the case of WSJV-DT because it is impossible from all practical perspectives for WSJV-TV to reach 100 percent replication.

Specifically, WSJV-TV's analog and digital operations share a common tower. WSJV-DT's digital antenna for channel 58 is side-mounted below WSJV's top-mounted analog antenna for channel 28. Accordingly, WSJV-TV cannot raise the height of the digital antenna unless it switches the placement of the analog and digital antennas on the tower and thereby reduces analog operations by reducing the service area and population that currently is receiving WSJV's analog signal, a result contrary to the public interest. Moreover, WSJV-TV cannot replace its existing digital antenna with a larger antenna because the tower does not have the load capacity to accommodate the extra weight associated with a larger antenna.

The only way for WSJV-DT to reach 100 percent replication would be to replace the current digital transmitter with a higher power transmitter. Because, however, transmitters tuned to out-of-core channel 58 will be outmoded in a few years and consequently have little resale value, the purchase of a new soon-to-be-outmoded higher power transmitter would compound the stranded investment that WSJV-TV already is incurring by building out on its interim digital channel using facilities with little resale value.

In sum, in light of the fact that WSJV-DT operates on an out-of-core digital channel and to meet the replication standard would need to purchase additional equipment tuned to channel 58 that would have little resale value at the end of the digital transition, 96.3 percent replication should be considered in substantial compliance with the Commission's standard and therefore justifies grant of the requested waiver. Tower issues that WSJV-TV cannot reasonably overcome also militate in favor of granting the requested waiver.

Please contact WSJV-TV's undersigned attorneys if you have any questions.

Respectfully submitted,

/s/

Kenneth E. Satten

Timothy J. Cooney

Attorneys for WSJV Television, Inc.

cc: Shaun Maher

⁵ As a licensee assigned an out-of-core interim digital channel, WSJV-TV was eligible to request FCC permission to surrender its assigned DTV channel and flash cut at the end of the digital transition (as a station in the top 100 markets affiliated with one of the top four networks, however, WSJV-TV's request to flash-cut would not have been subject to a presumptive grant). If the request was granted, WSJV-TV would have been automatically considered compliant with the replication standard without any further digital build-out. *Report and Order* at ¶95 n.220.